Petition

No. 81-528

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In the Supreme Court of the United States

OCTOBER TERM, 1980

PHILLIP CELANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether in concluding that Petitioner's "presence" at the scene of the crime and "association" with those involved in a criminal enterprise were sufficient to allow the jury to find him guilty beyond a reasonable doubt of the conspiracy and manufacture of phencyclidine, the Seventh Circuit applied a standard of review in direct conflict with the decisions of that Circuit and every other Circuit which has addressed the issue.

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PHILLIP CELANO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Phillip Celano prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is appended hereto as Appendix A. The order denying Petitioner a rehearing is likewise appended to this Petition as Appendix B.

JURISDICTION

The order of the Court of Appeals was entered on June 25, 1981. Petitioner's Petition for Rehearing, timely filed, was initially denied July 21, 1981, and then, by amended order, on August 21, 1981. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 20(1) and (4) of the Rules of this Court.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

21 U.S.C. 841 provides in pertinent part:

> '(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally— (1) to manufacture . . . a controlled substance;"

21 U.S.C. 846 provides in pertinent part:

> "Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy."

STATEMENT OF THE CASE

On January 23, 1980, Petitioner, Phillip Celano, together with others, was charged in two counts of a four-count indictment, with conspiracy to manufacture phencyclidine (PCP), a Schedule II controlled substance, under Count I, and with the manufacture of phencyclidine under Count II, in violation of Title 21, U.S.C., Sec. 846 and Sec. 841(a)(1), respectively. One of the six defendants so charged, Chalmers Smith, was severed from the others. The remaining five defendants proceeded to trial on Counts I and II. After a nine-day jury trial, all defendants were found guilty as charged.

On June 12, 1980, Petitioner Celano was sentenced to the custody of the Attorney General for five (5) years on Count I, eight (8) years on Count II, to run concurrently and to be followed by a special parole term of ten (10) years.[1] Additionally, the trial court imposed a fine upon Petitioner of $15,000 on each count, totaling $30,000.

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. 1291. The Court of Appeals affirmed in a judgment and order dated June 25, 1981, attached hereto as Appendix A. Petitioner's Petition for Rehearing, timely filed, was denied in an order dated July 21, 1981, as amended in an order dated August 21, 1981, attached hereto as Appendix B. The instant Petition for Writ of Certiorari follows.

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[1] Presently, there is a motion pending in the District Court challenging the imposition of the special parole term on the authority of *Bifulco* v. *United States*, ____ U.S. ____, 100 S.Ct. 2247 (1980).

REASONS FOR GRANTING THE WRIT

1. In concluding that Petitioner's "presence" at the scene of the crime and "association" with those involved in a criminal enterprise were sufficient to allow the jury to find him guilty beyond a reasonable doubt of the conspiracy and manufacture of phencyclidine, the Seventh Circuit applied a standard of review in direct conflict with the decisions of that Circuit and every other Circuit which has addressed the issue.

The evidence adduced at trial against Petitioner was entirely circumstantial in nature. A fair summary of that evidence demonstrates that Petitioner Celano had some prior association with two or three of the alleged co-conspirators and was present at the scene at the time the arresting agents decided to effectuate their arrest, albeit outside the actual location in which the phencyclidine (PCP) lab was said to be found. Such evidence has uniformly been held to be far too insufficient to sustain a conviction for conspiracy under Title 21, U.S.C., Sec. 846. *United States* v. *Mancillas*, 580 F.2d 1301, 1308 (7th Cir., 1978); *United States* v. *Garcia*, 562 F.2d 411, 414 (7th Cir., 1977); *United States* v. *Quintana*, 508 F.2d 867, 880 (7th Cir., 1975); *United States* v. *White*, 569 F.2d 263, 268 (5th Cir., 1978); *United States* v. *Cloughessy*, 572 F.2d 190, 191 (9th Cir., 1977). See also *United States* v. *Baker*, 499 F.2d 845, 848-49 (7th Cir.), *cert. den.*, 419 U.S. 1071 (1974); *United States* v. *Garguilo*, 310 F.2d 249, 253 (2nd Cir., 1962).

At the conclusion of all the evidence, the District Court properly instructed the jury as to the law, specifically informing the jury that mere presence at the scene of a crime

and knowledge that a crime is being committed are not sufficient to establish a defendant's guilt. Further, the District Court specifically informed the jury that mere association with alleged co-conspirators is insufficient to prove a defendant's participation or membership in a conspiracy.[2] Notwithstanding the nature and content of the evidence and the specific instructions given, the jury returned a verdict of guilty against Petitioner. On appeal, Petitioner contended against this verdict on the ground that there was insufficient evidence from which a jury could reasonably infer that Petitioner Celano actually joined a conspiracy or engaged in the manufacture of PCP or even caused PCP to be manufactured. The Court of Appeals below, in rejecting this contention, concluded that the "circumstances" adduced at trial were "sufficiently inconsistent with a reasonable hypothesis of Appellent Celano's innocence to allow the jury to find him guilty beyond a reasonable doubt of the conspiracy to manufacture PCP and the manufacture of PCP." (See Appendix A, p. 6) The basis for this conclusion, as seen by the Court of Appeals, is that Petitioner Celano was "associated with every observed activity" at the site of the alleged clandestine laboratory and that Celano's "voluntary presence" at that site for over two hours is "strongly indicative of his involvement in the production of the chemical." (See Appendix A, p. 6) Assuming for the moment only the accuracy of these judicial pronouncements, they hardly provide a legitimate basis on which to sustain Petitioner's

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[2] The "presence" and "association" instruction as given were tendered by the Government at the instruction conference, finding specific approval in the 1980 Federal Criminal Jury Instructions, prepared by a Special Committee on Federal Criminal Jury Instructions of the Seventh Circuit, Instruction 3.04 and the Committee Comments thereunder.

conviction. Quite to the contrary, the law in every circuit, including the Seventh Circuit, demands acquittal under these circumstances. As such, the instant decision creates an intra- and inter-circuit conflict warranting the issuance of a Writ of Certiorari.

Thus, in *United States* v. *Quintana, supra,* the Seventh Circuit found that evidence of Quintana's presence on two occasions when narcotics were discussed and the fact of two telephone conversations with a co-defendant, in one of which Quintana admitted possession of heroin, was insufficient as a matter of law to support a conviction for conspiracy to import and distribute heroin. The Court there stated:

> "That Quintana may have possessed heroin and had the *opportunity* to join the Suarez' conspiracy is not sufficient proof that Quintana did agree to participate in the scheme to import and distribute large quantities of drugs." (emphasis added). 508 F.2d at 881.

Here, the Government's proof did not even so much as show that narcotics were ever discussed in Celano's presence. Further, in none of the telephone conversations offered at the trial of this cause was there any suggestion that Celano ever admitted to the possession or manufacturing of any narcotic, or other drug, much less specifically PCP. In fact, there was no evidence of any kind that Celano actually discussed PCP with anyone on any occasion, whether in person, over the phone or otherwise. As such, under the standard applied by the Seventh Circuit in *Quintana,* Celano's presence outside the location of the alleged PCP lab is certainly insufficient to sustain the convictions. Yet, the Seventh Circuit in this case either ignored or overlooked this standard in affirming the conviction.

Similarly, in *United States* v. *Baker*, 499 F.2d 845 (7th Cir., 1974), *cert. den. sub. nom.*, *Felts* v. *United States*, 419 U.S. 1071, the Seventh Circuit held that Defendant Vela's sale of 500 pills, Vela's association with the actual perpetrator, and subsequent flight in a car with one of the conspirators was "insufficient evidence from which a jury could reasonably infer that Vela intended to participate in a conspiracy or 'knew of the conspiracy and associated himself with it.'" *Id.* at 849.

Likewise, here, as in *Baker*, the prior association with alleged co-conspirators, under the *Quintana-Baker* standard, is simply insufficient to justify a verdict of guilty. In fact, in this record, the association was explained by a government witness, a Mrs. Gately, as innocent association based on friendship between Celano and the Witz brothers, two alleged co-conspirators. The only concrete piece of evidence adduced at trial which in any way sheds light on what Celano was doing with the Witz brothers prior to the arrest was that on January 13, 1980, he was present at a birthday party for the Witz brothers. This innocent association, once again, may not support a conviction. Moreover, Celano, unlike Vela, was not demonstrated to have sold any PCP, pills or other narcotics. Finally, unlike Vela, there was no subsequent flight in the Celano situation. Thus, applying the Seventh Circuit *Quintana-Baker* standard, the evidence presented here was insufficient to support a conviction. Something more than opportunity and association, or even flight, was necessary, but not demonstrated.

Again, in *United States* v. *White*, 569 F.2d 263 (5th Cir., 1978), the Fifth Circuit Court of Appeals there found that evidence that both Clandell and Phillips sold heroin and were married to each other was insufficient to prove the existence of conspiracy. The *White* court stated, "These

bits and pieces of evidence add up to no more than grounds for conjecture and suspicion that the conspiracy existed, not proof beyond a reasonable doubt." *Id.* at 267. Accordingly, the Fifth Circuit reversed the convictions.

In kind, the instant case, viewing the entirety of the evidence in a light most favorable to the Government, left the jury with nothing more than conjecture and suspicion about whether Phillip Celano actually joined a conspiracy or did anything more than associate on different occasions. The aberrant "strongly indicative" standard adopted by the Court of Appeals below in this case must necessarily be rejected to avoid conviction predicated on conjecture and suspicion alone.

Further review of Second, Third, Fifth and Ninth Circuit decisions involving facts comparable to those in the present case plainly reveal that such evidence is insufficient to establish proof of membership in a conspiracy. See, for example, *United States* v. *Bingos*, 579 F.2d 747 (2nd Cir., 1978) (defendant's presence in the vicinity of a drug transfer by his brother held insufficient evidence of conspiracy); *United States* v. *Cooper*, 567 F.2d 252 (3rd Cir., 1977) (riding in a truck carrying 1,100 pounds of marijuana from Colorado to Pennsylvania and sharing motel room with conspirator held insufficient evidence of conspiracy); *United States* v. *Gutierrez*, 559 F.2d 1278 (5th Cir., 1977) (association with relative who sold heroin on the occasion of each of three drug sales and discovery of marked money in defendant's house held insufficient evidence of conspiracy); *Arellaires* v. *United States*, 302 F.2d 609 (9th Cir., 1962) (association of husband and wife held insufficient to prove that wife was engaged in a joint venture with the husband); and see, *United States* v. *Rozen*, 600 F.2d 494 (5th Cir., 1979); *United States* v. *Caro*, 569 F.2d 411 (5th Cir., 1978); *United States* v. *Oliva*, 497 F.2d 130 (5th Cir., 1974).

The evidence on which the Government so heavily relied in its case against Celano, in an attempt to distinguish it from the overwhelming body of authority mandating acquittal, is a piece of cardboard which was removed from the trunk of a Cougar in which Celano was arrested outside the location of the alleged PCP lab. However, this cardboard was no more supportive of Celano's membership in a conspiracy to manufacture PCP than it is of the membership of anyone else. No one testified that it was Celano who placed the cardboard in the trunk. No one testified that Celano was aware of the function of the cardboard, if any, or its relationship to the conspiracy or the manufacture of PCP. All that could be said was that this cardboard, found in the trunk, was like that cardboard found to be used in the drying process of the PCP confiscated from the closed bedroom of the suspected laboratory location. As Celano's fingerprints were not on the cardboard, as the vehicle from which the cardboard was removed was not registered to Celano, as no one could say that the cardboard had not always been in the trunk of that vehicle, and as that piece of cardboard contained no chemical traces of PCP, it was totally improper for the jury to infer from that cardboard that Celano, more than any other human being, was guilty of a specific conspiracy to manufacture PCP as charged in Count I or guilty of the actual manufacture of PCP as charged in Count II.

In sum, the most that can be said for the evidence presented was that Phillip Celano had some prior association with alleged co-conspirators and was present at the scene at the time the agents decided to effectuate their arrest. Yet, every Circuit which has ever considered this issue has repeatedly and consistently held that "association" and even "voluntary presence" is insufficient proof. Simply put, keeping bad company has never been a crime. A writ of certiorari should be issued in this case to preclude it from becoming one.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be allowed to review the instant decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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JEFFREY B. STEINBACK
Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued: May 14, 1981
June 25, 1981
Before
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip Nichols, Jr., Judge*
Hon. Richard D. Cudahy, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 80-1866, 80-1878
& 80-1881 vs.

PHILLIP CELANO, WAYNE SPRINGER,
JAMES WITZ and JOHN WITZ,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-Cr-23
Prentice H. Marshall, *Judge*.

Order

On January 23, 1980, an indictment was returned against defendants-appellants Philip Celano, Wayne F. Springer, James Witz and John Witz. Count One of the indictment

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* The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

charged the defendants[1] with conspiracy to manufacture phencyclidine ("PCP"), a Schedule II Controlled Substance, in violation of 21 U.S.C. § 846 (1976).[2] Count Two of the indictment charged the defendants with the manufacture of 3,881 grams (8½ pounds) of PCP in violation of 21 U.S.C. § 841(a)(1)(1976).[3] After a nine-day jury trial, all defendants were convicted on both counts of the indictment.[4] Celano and Springer argue on appeal that the evidence in the record is insufficient to sustain their convictions. James and John Witz contend that the district

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[1] Chalmers Smith and Nimrod Solomon were also named as co-conspirators in Count One of the indictment. The charges against Smith were severed from those against the other defendants; Solomon is deceased.

[2] Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[3] Section 841(a)(1) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

[4] Celano was sentenced to concurrent terms of imprisonment of five years on Count One and eight years on Count Two, to be followed by a special parole term of ten years. He was also fined $15,000 on each count. Springer was sentenced to concurrent terms of five years on Count One and ten years on Count Two, to be followed by a special parole term of ten years. Springer was also fined $15,000 on each count. James Witz was sentenced to concurrent terms of five years on Counts One and Two, to be followed by a special parole term of five years. John Witz received a sentence of concurrent three year terms on Counts One and Two, to be followed by a special parole term of five years.

court erred in failing to suppress evidence obtained from a search of John Witz' residence and from statements made by James and John Witz after their arrest. We affirm.

I.

The evidence in this case discloses the existence of a sophisticated and well-coordinated scheme to manufacture PCP. The earliest evidence in the record consists of a torn sheet of yellow paper seized during a search of an apartment in Chicago. This sheet contained a handwritten list of the names and quantities of seven chemicals used in the production of PCP.[5] The government's handwriting expert testified that this list was written by Wayne "Frank" Springer. The bottom and matching half of the sheet of paper, which was also seized during the search, contained the names of several chemical companies and the notation "Frank", under which two telephone numbers were written. The first of these numbers was issued to an apartment leased by Springer on North State Street in Chicago. The second number, issued to an address on Clark Street in Chicago, was given out and used by Springer to make and receive calls. The government's expert testified that the bottom half of the sheet had been written by Chalmers Smith.

In early November 1979, Nimrod Solomon went to the A. Daigger Chemical Company in Chicago and gave Harry Woldenberg, the president of Daigger, a list of chemicals which had been written (according to the government's expert) by Smith. Solomon did not place any orders that day.

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[5] The chemicals were piperidine, phenyl magnesium bromide, cyclohexanone, potassium cyanide, ammonium chloride, hydrochloric acid, and hydrobromic acid.

Three days later, using a false name and the letterhead of a non-existent company, Solomon returned to Daigger, where he ordered 10 gallons of piperidine and made a down payment of $1,000 in cash. Later that day, Woldenberg notified the Drug Enforcement Administration (DEA) about the purchase of piperidine.

Solomon returned to Daigger several times during November and December 1979, and January 1980. During each of these visits, Solomon would purchase one or more of the chemicals necessary to produce PCP, paying for these purchases with cash. Chalmers Smith, James Witz and an unidentified man accompanied Solomon on some of the visits to Daigger.

The drugs purchased from Daigger were apparently stored at several locations, including the residence of Susan and Harvey Gately, the sister and brother-in-law of John and James Witz, the residence of James Witz in Niles, and the residence of Gertrude Witz, the mother of John and James Witz.

On December 12, 1979, James Witz inquired at the Continental, Hart, Shaw real estate office in Lake Forest, Illinois about leasing a secluded house with a large basement and/or a large garage. Three days later, he leased a house on a two-acre lot located at 1207 Old Mill Road in Lake Forest.

Several of the named conspirators were observed at the Old Mill Road residence on four occasions during the first two weeks of January, 1980. On January 2, 1980, James Witz picked up the final order of chemicals from Daigger and dropped them off at the Gately residence. He then drove to 1207 Old Mill Road, where he met several persons, who together unloaded several boxes from a truck James Witz had driven to that address. Two other auto-

mobiles, a black Mercury Cougar associated with Celano[6] and John Witz' LTD, were observed at the Old Mill residence during this time period. Both cars were driven to Gertrude Witz' residence and then returned to 1207 Old Mill Road again for approximately one and one-half hours in the early evening. Witz and Springer then drove to the Gately residence (where Springer remained in the car) and finally to James Witz' residence in Niles. The Cougar was driven to an address used by Chalmers Smith, where John Witz' truck was parked. On January 9, several persons, including John Witz and Celano, were seen at the Old Mill Road residence for approximately one hour. Some fifteen minutes after Celano left the Old Mill Road residence, DEA Agent Morley approached the house and noticed a strong chemical smell of ether in the area.

On January 10, two persons traveling in the Cougar identified with Celano arrived at 1207 Old Mill Road, where they remained for approximately thirty minutes. On January 13, 1980, James Witz and Celano met at the Gately residence at about 6:30 p.m. Celano parked his car at the Gately's. The two men left together in another car, and returned together between 8 and 9:00 p.m. During this time period, John Witz' Ford LTD arrived at 1207 Old Mill Road with two or three passengers. The car remained for approximately one hour and fifteen minutes and then traveled to the Gately residence where the Cougar was still parked.

On January 14, 1980, the Cougar and John Witz' Ford LTD left John Witz' house, with Celano and Springer in

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[6] The Cougar had been rented from Budget Rent-A-Car by Karen Kaplan, a "close friend" of Celano. After renting the car with $250 Kaplan received from Celano, Kaplan gave Celano the only set of keys to the car for his use. Kaplan testified that she never went to any of the locations at which the Cougar was observed by agents on January 2 and thereafter.

the Cougar and John and James Witz in the Ford LTD. After arriving at 1207 Old Mill Road at 1:15 p.m., all four entered the house and remained until 3:00 p.m., when they left the house and approached the cars. As the two cars drove out of the driveway, they were stopped by DEA agents and police.

After the stop, several agents testified that they noticed the strong chemical smell of ether coming from Celano and the Cougar. Pursuant to a search warrant, a DEA agent obtained the keys to the Old Mill Road residence from James Witz and entered the house with another agent. Both agents noticed the strong chemical smell of ether. In the front bedroom, the agents found a container of hydrobromic acid and nine pieces of posterboard with approximately 8.5 pounds of PCP drying on them. In the rear bedroom, several items used in the manufacture of PCP, including a ring stand, a separatory funnel, a graduated cylinder and three strainers, were found. Numerous other components and equipment used in the manufacture of PCP were found in the kitchen and living room.

The only furniture in the house consisted of one couch in the recreation room in the rear of the house and one table in the kitchen. There were no tools or equipment for painting, carpenter's tools, cleaning supplies, food, cooking utensils, television, radio, books, newspapers or other reading material in the house.

After the search of the house, a DEA agent advised the agents and police officers in the area that there was a clandestine laboratory operation in the house and that Celano, Springer and James and John Witz, were under arrest for violation of federal narcotics laws. Each of the four was advised of his rights by arresting officers or agents.

An agent informed the Witz brothers, that the DEA intended to obtain search warrants for John Witz' home but, if they consented to the searches of those premises, considerable time could be saved for all.

A short time later, John Witz signed a consent form allowing agents to search his house in Lake Bluff. The agents and the Witz brothers then went to John Witz' residence. John Witz took several agents to the garage which contained various chemicals used in the manufacture of PCP. John Witz then took the agents to his basement storage closet which contained posterboards and other items which could be used in manufacturing PCP. They next went to an upstairs bedroom where three pieces of posterboard with 1-PCC (a compound formed during the second stage of manufacturing PCP) were found. Many of the items recovered from John Witz's residence contained 1-PCC. The strainer, white pails and posterboards found in the John Witz home were identical in size and markings to their counterparts found at 1207 Old Mill Road.

After that search was completed, agents went to the Gately residence in Deerfield. The agents identified themselves to Mrs. Witz, the mother of James and John Witz, who let the agents remove from the crawl space a quantity of chemicals used in the manufacture of PCP.

II. Appeals of Celano and Springer

Celano and Springer argue that the evidence presented at trial was insufficient to establish their participation in the manufacture of PCP or in a conspiracy to manufacture PCP. We disagree.

There can be no question that a conspiracy to manufacture PCP existed, and Celano and Springer have conceded the existence of the conspiracy for the purpose of

their argument. The single question that remains, therefore, is whether the evidence is sufficient to establish that Celano and Springer knowingly joined the conspiracy and participated in the manufacture of PCP. *United States* v. *Holmes*, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972). "Where, as here, convictions are based entirely upon circumstantial evidence, the appellate issue is whether a jury of reasonable individuals could conclude that the 'evidence is inconsistent with the hypothesis of the accused's innocence.'" *United States* v. *Gordon*, 580 F.2d 827, 834 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978) citations omitted).

Viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we believe the evidence and inferences reasonably drawn therefrom are sufficient to allow a jury of reasonable people to conclude that Celano and Springer were knowing participants in the conspiracy and manufacture of PCP.

A. Evidence pertaining to Celano

Celano was associated with every observed activity at the Old Mill residence. On January 2, 9, 10 and 14, 1980, the Cougar rented by Karen Kaplan and used by Celano either was waiting for, arrived shortly after or arrived together with cars owned by Witz and Smith at 1207 Old Mill Road. On both January 9 and 13, government agents observed Celano, together with James Witz and others, at the Old Mill Road residence. After the government's chemist analyzed the moist PCP found in the Old Mill Road residence on January 14, he concluded that when Witz and Celano entered the house on the 13th, they probably added the phenyl magnesium bromide to the PCP base, a procedure which represents the second step in the manufacture of PCP.

Celano also was observed arriving at 1207 Old Mill Road on January 14, 1980 with the other defendants, where he remained inside the house for approximately two hours.

After leaving the house he smelled strongly of ether. The jury could reasonably view the voluntary presence of Celano at the Old Mill location for over two hours, presumably inside (because of his odor) a house that contained nothing but equipment and components for the production of PCP, as a circumstance strongly indicative of his involvement in the production of the chemical. *Cf. United States* v. *Staten*, 581 F.2d 878, 885 n.7 (D.C. Cir. 1978).

Taken as a whole,[7] we believe these circumstances are sufficiently inconsistent with a reasonable hypothesis of Celano's innocence to allow the jury to find him guilty beyond a reasonable doubt of the conspiracy and manufacture of PCP.

B. Evidence pertaining to Springer

Springer was first linked to the conspiracy when the list of chemicals written in his handwriting was seized in an unrelated investigation in early November, 1979. Nimrod Solomon followed this list exactly in obtaining prices for certain amounts of the chemicals listed. From November 1, 1979 to January 12, 1980, 15 calls were made from the residences of Chalmers Smith and James Witz to Springer's apartment. Seven calls were also made from his apartment to the homes of Celano, James Witz and Smith.

Springer was also present when the first documented delivery of chemicals to 1207 Old Mill Road was made on January 2, 1980. And, Springer travelled with Celano to the Old Mill Road residence on January 14, 1980, where he remained inside the house for approximately two hours.

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[7] The government also produced lists of telephone calls between phones available to Celano and phones identified with several of the other alleged conspirators.

We believe these circumstances are sufficient to support the jury's verdict of guilty against Springer.[8]

III. Appeals of James and John Witz

John Witz argues that his consent to the search of his home in Lake Bluff, Illinois was coerced and, therefore, that the fruits of the search should have been suppressed. Both John and James Witz testified before the district court that John Witz consented to the search after he was told that the door to his home would be broken down if the agents were put to the trouble of obtaining a search warrant. This alleged threat is troubling, especially in light of the government's failure to present testimony or evidence in rebuttal. Such a threat, standing alone, would strongly indicate that consent was not voluntarily given.

But, in determining whether a defendant's consent was voluntary, the totality of the circumstances must be examined. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). We believe, after examining the circumstances surrounding Witz' arrest and his consent to the search of his home, that the district court's finding that consent was voluntarily given was not clearly erroneous.

The record shows that Witz was twice advised of his rights when he was first arrested. *Cf. United States* v. *Watson*, 423 U.S. 411 (1976). And, when a DEA agent showed John Witz the consent to search form, Witz was informed that he did not have to sign it if he did not wish to do so. He signed the form on the condition that the agents did not make a "big scene" in front of his house

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[8] Springer and Celano also contend that the trial judge erred in failing to instruct the jury on their theory of defense that multiple conspiracies were supported by the evidence. We believe this proposed instruction was properly denied, since the evidence demonstrated the existence of a single conspiracy to manufacture PCP. Although defendants joined the conspiracy at different times and participated in different ways, all worked toward the common goal of the conspiracy. Cf. Kotteakos v. United States, 328 U.S. 750 (1946).

with a lot of cars and flashing lights. During this time, both brothers acted friendly and told the agents that they had been treated like gentlemen and not harassed.

Once the consent form was signed, the DEA agents went with John Witz to his home. When they arrived, Witz' handcuffs were removed and he was given the opportunity by agents to speak with his wife in private. Witz then assisted the agents in the search of his house and garage, showing them the various chemicals stored in the garage and assisting them in physically removing them. The agents testified that Witz' attitude was friendly and cooperative through the entire period of the search.

Viewing the totality of the circumstances, we believe the district court did not err in failing to suppress the evidence obtained during the search of John Witz' home.[9]

IV.

Defendants' convictions are therefore affirmed.

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[9] James and John Witz also argue that the district court erred in failing to suppress their post-arrest statements. They argue that since the agents had been conducting surveillance for approximately two months, they had probable cause and ample time to obtain arrest warrants, at least by January 11, 1980, the date a search warrant for the Old Mill Road residence was issued. Defendants argue that if warrants had been issued, they would have immediately had a right to counsel and therefore that the failure of the agents to obtain arrest warrants violated their Sixth Amendment right to counsel.

We agree with the district court that the agents did not have probable cause to arrest James and John Witz for the conspiracy and manufacture of PCP until January 14, 1980, when the clandestine laboratory was discovered. Therefore, the warrantless arrest was justified. United States v. Watson, 423 U.S. 411 (1976). Moreover, defendants did not suffer any deprivation of their Sixth Amendment rights since they were advised immediately upon their arrest of their right to counsel when they were twice informed of their rights pursuant to the mandate of Miranda v. Arizona, 384 U.S. 436 (1966).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 21, 1981.

Before

Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip Nichols, Jr., Judge*
Hon. Richard D. Cudahy, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 80-1866 & 80-1811 vs.

PHILLIP CELANO, *et al.*,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-Cr-23
Prentice H. Marshall, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Philip Celano, *et al.*, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.